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No. 83-

in the
Supreme Court
of the
United States

October Term, 1983

HARVEY S. KLEINMAN AND
BONNIE M. KLEINMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA
AND INTERNAL REVENUE SERVICE
SPECIAL AGENT EUGENE BROZEN,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals,
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

I.

IN AN INTERNAL REVENUE SERVICE SUMMONS ENFORCEMENT PROCEEDING BROUGHT PURSUANT TO SECTIONS 7602 AND 7609 OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED, HEREINAFTER THE CODE, IS THE TAXPAYER (INTERVENOR) ENTITLED TO AN ADVERSARY (EVIDENTIARY) HEARING WHEN THE TAXPAYER FILES RESPONSES ALLEGING WITH PARTICULARITY, SUPPORTED BY AFFIDAVITS, THAT SUCH SUMMONS WAS ISSUED IN "BAD FAITH" FOR A PURPOSE NOT AUTHORIZED BY SECTIONS 7602 AND 7609 OF THE CODE.

II.

IS SUCH A TAXPAYER WHO IS DENIED AN ADVERSARY (EVIDENTIARY) HEARING DENIED DUE PROCESS OF LAW AS REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III.

IS SUCH A TAXPAYER'S APPEAL TO A UNITED STATES COURT OF APPEALS RENDERED MOOT WHEN THE INTERNAL REVENUE SERVICE OBTAINS THE SUMMONED RECORDS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. A, *infra*, P A-1) is unreported. The Court dismissed the appeal determining that the Appeal was moot on August 17, 1983 (App. A, *infra*, P A-1). The decision of the United States District Court enforcing the summonses was entered on April 23, 1983 (App. B *infra*, P B-1-3). The Orders of the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit denying Petitioners' Motion To Stay were entered on April 23 and April 25, 1983, respectively. (App. D-1-3; App. E-1)

The opinion of the United States Court of Appeals was entered on August 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Amendment V of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States and Sections 7602 and 7609 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. Sections 7602 and 7609 as set forth in the Appendix. (App. C, *infra*, C-1 to C-9).

STATEMENT OF THE CASE

Harvey S. Kleinman and Bonnie M. Kleinman, his wife, hereinafter the Petitioners, were noticed that four Internal Revenue Service summonses were served upon two banks in Broward County Florida (R. I-4; III-4; IV-5; V-4).¹ Each of the summonses were served upon the banks as third party record keepers, pursuant to Section 7609 of the Code. Petitioners, through counsel, pursuant to Section 7609(b)(2) of the Code, timely notified each of the respective banks not to comply with the summonses (R, I-73, 74; III-85, 86; IV-86, V-144, 145).

The United States of America and Special Agent, Eugene Brozen, of the Internal Revenue Service, hereinafter IRS, filed four Petitions to Enforce the Summonses in the United States District Court for the Southern District of Florida (R, I-1; III-1; IV-1; V-4). The Court issued four Orders to Show Cause and further issued an Order *sua sponte* consolidating the four cases (R, I-7; III-10; IV-9; V-67). The Court in said Orders to Show Cause ordered that Petitioners, if they opposed the enforcement action, intervene and set forth reasons supported by affidavits as to why enforcement should not be granted (R, I-8; III-11, IV-10; V-68).

¹At the time this Petition was prepared counsel had possession of the record prepared for the Appeal to the United States Court of Appeals for the Eleventh Circuit to prepare Appellant's Brief. Therefore, all references to the Record "R" are accurate references though the record has not yet been certified to this Court. However, since the Record is in five volumes which do not have consecutively numbered pages, record references will be first to the Record "R", next to the volume I, II, III, IV or V and last to the page, e.g., R, I-1.

Petitioners filed a Response, Supplemental Response and Motion for Evidentiary Hearing and to Orally Examine Special Agent, Brozen, supported by affidavits, and a Motion to Strike the Petition and/or Quash the Summons (R, I-12, 17, 19, 22, 26, 82; III-15, 17, 20, 24, 70, 79, 94; IV-14, 16, 19, 23, 80, 95; V-9, 72, 74, 77, 81, 138, 153). Petitioners contended in their Response, Supplemental Response and Motion for Evidentiary Hearing, supported by affidavits that the summonses were issued in "bad faith" and for a purpose not authorized by Sections 7602 and 7609 of the Code (R, I-17-18, 30-31, 42-44; III-28-30, 40-42, 70-76; IV-14, 15, 27-29, 39-41, 69-72; V-72-73, 85-87, 97-99, 127-130). Specifically, Petitioners alleged that the purpose for the issuance of the summonses was to obtain Petitioners' records and deliver same to a private third party to assist said third party in private litigation with Petitioners (R, I-42-44; III-40-42, 70-76; IV-39-41, 69-72; V-97-99, 127-130). Petitioners' Response, Supplemental Response and Motion for Evidentiary Hearing and exhibits attached thereto, detailed that Petitioner, Harvey S. Kleinman was the former sales manager for American Permac, Inc., a New York corporation, hereinafter "Permac", had left his employment and established a competitive business enterprise (R, I-30-31; III, 40-42; IV-27-29; V-85-87). Permac sued the Petitioners in a Florida state court alleging events which occurred both before and after Petitioner left Permac caused Permac damage (R, I-30-31; III-40-42; IV-27-29; V-85-87). To obtain discovery not otherwise available and with the avowed purpose of destroying Petitioners' business, Permac contacted the IRS (R, I-30-31; III-40-42; IV-27-29; V-85-87).

The former comptroller of Permac was present during meetings of the IRS and Permac at all pertinent

times. He executed an affidavit stating that he was present at a meeting between agents of the IRS, including Special Agent, Eugene Brozen, whereby Permac told the IRS that Permac wanted the information obtained from the income tax investigation of Petitioner, Harvey S. Kleinman, delivered to it and Brozen acquiesced. (R, III-70-73; IV-69-72; V-127-130).²

Appellees filed a Response to the Motion for Evidentiary Hearing. Said Response, citing applicable case law, acknowledged that Petitioners were entitled to an evidentiary hearing (R, I-80; III-92; IV-93; V-151).

The Lower Court denied any form of evidentiary hearing. (II-R-1-24)

Petitioners further alleged Section 7609 Code defects in the summonses and requested an evidentiary (adversary) hearing on such defects. These allegations may be briefly summarized as follows:

1. Though the Petitioners had received the notices of the summonses, the notices contained the incorrect address of Petitioners (R, I-35; III-33; IV-32; V-90);

2. Though records of the Petitioner, Bonnie M. Kleinman, were sought to be produced by the summonses, neither the summonses nor the Petitions for enforcement stated that her tax liability was under investigation or that her records were relevant or material (R, I-16-17; III-39-40; IV-38-39; V-96-97);

²Bonnie Kleinman is not under investigation but her individual records were summoned from the Third Party Recordkeepers.

3. Each of the summonses sought certain specific records and then contained language requesting "... including but not limited to ..." and Petitioners contended that the subject summonses lacked the requirement that records be described with "... reasonable certainty ..." required by Section 7602 and 7603 of the Code (R, I-16-17); III-39-40; IV-38-39; V-96-97).

On April 22, 1983, the Court held a non-evidentiary hearing on the Orders to Show Cause (R, II-1-24). Special Agent Brozen was present at this hearing as was Arthur Giles. (R, II-17). No testimony or evidence was allowed to be taken and all of the objections to the summonses were denied (R, II-23). The Court refused to grant Petitioners an evidentiary hearing on the question of "bad faith" as well as the other issues raised by the Petitioners (R, II-23). The Court also denied Petitioners' motion to Stay pending appeal (R, I-87, 88; III-90, 100; IV-100, 101; V-158, 159).

Petitioners immediately filed a Motion to Stay with the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals denied the Motion to Stay and Petitioners filed a Notice of Appeal (R, I-89; III-101; IV-102; V-160).

After the filing of a Notice of Appeal and prior to the time Petitioners' brief was due to be filed, the government and Special Agent Brozen filed a Motion to Dismiss with the Court of Appeals contending that since the records sought by the summons had been

produced, the Appeal was moot.³ Petitioners filed a timely Memorandum in Opposition to the Motion to Dismiss. The Court of Appeals without opinion entered an Order Dismissing the Appeal as Moot on August 17, 1983 (App. A, *infra*, P A-1).

REASONS FOR GRANTING THE WRIT

This Court has consistently held that a taxpayer in an IRS summons enforcement proceeding who alleges that a summons was issued for a purpose not authorized by Section 7602 of the Code or whose enforcement would be an abuse of the Court's process has a right to an adversary hearing and has granted writs of certiorari to establish that right and reaffirm it. *Reisman v. Caplin*, 375 U.S. 440 (1964); *United States v. Powell*, 379 U.S. 48 (1969); *United States v. LaSalle*, 437 U.S. 313 (1978).

The reasons for granting the writ are even more compelling where the taxpayers alleged with particularity the "Bad Faith" and supported such allegations by affidavits and still were denied an adversary hearing. Further, this is a case of first impression inasmuch as the facts fall within the setting of Section 7609 of the Code wherein Congress allowed taxpayers to intervene in a third party record keeper enforcement proceeding.

Amendment V to the United States Constitution provides, *inter alia*, that "No person shall be . . . deprived of life, liberty or property, without due process of law . . . " The right to an adversary

³The Record did not contain the Motion or Petitioners' Memorandum in Opposition thereto because same were filed after the Record was prepared for Appellants.

hearing in a summons enforcement proceeding is grounded upon this basic constitutional right which Petitioners were denied.

Conflict also exists among the United States Courts of Appeal with respect to the right to such adversary hearing. Compare, *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661 (5th Cir. 1981); *United States v. Harris*, 628 F.2d 875 (5th Cir. 1975); *United States v. Salter*, 432 F.2d 697 (1st Cir. 1976); *United States v. Samuels, Kramer & Co.*, 52 AFTR 2d 83-5670 (9th Cir. 1983); *Genser v. United States*, 602 F.2d 69 (3d Cir. 1979) and *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36 (2d Cir. 1978) where the Courts recognized the right to an adversary (evidentiary) hearing contrary to the case at bar and the District Court for the Southern District of Florida denied an adversary hearing and the Eleventh Circuit dismissed the appeal as moot.

ARGUMENT

A. Departure From Accepted And Usual Course Of Judicial Proceedings.

It is well established that a taxpayer in an IRS summons enforcement proceeding has a right to an adversary hearing where that taxpayer alleges that the summons was issued and served for purposes other than those authorized by Section 7602 of the Code. *Reisman v. Caplin*, 375 U.S. 440 (1964); *United States v. Powell*, 379 U.S. 48 (1964); *United States v. LaSalle*, 437 U.S. 313 (1978). The right of a taxpayer to ". . . challenge the summons on any appropriate ground . . ." established

by *Reisman v. Caplin*, was further explained in *United States v. Powell*, where the Court stated the following:

"This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing he 'may challenge the summons on any appropriate ground,' *Reisman v. Caplin*, 375 U.S. 440, at 449. Nor does our reading of the statutes mean that under no circumstances may the Court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.

Recently this Court in *United States v. Rylander*, 103 S.Ct. 1548, (1983), reaffirmed the right of a taxpayer to contest the enforcement of an IRS summons on any appropriate grounds in an adversary proceeding.

In the case at bar, Petitioners (Intervening Taxpayers) met their burden of showing that enforcement of the subject summonses would be an abuse of the

court's process and that the summonses were issued for a purpose not authorized by Section 7602 of the Code. Petitioners, in accordance with *Reisman v. Caplin*, and its progeny and pursuant to Section 7609 of the Code, timely intervened in the enforcement action filing a Response, Supplemental Response and Motion for Evidentiary Hearing. Said pleadings alleged, supported by affidavits, that the purpose for the issuance of the summonses was to obtain Petitioners' records from third party record keepers and disclose those records to a private third party. Specifically, Petitioners alleged that an agent or agents of the IRS had agreed to obtain records of the Petitioners through use of the summonses and turn those records over to American Permac, Inc. (Permac), an existing litigant with Petitioners. The affidavit of Permac's former comptroller was submitted to the Court in support of the Motion for Evidentiary Hearing, and he, under oath, swore that he was present when Special Agent, Eugene Brozen, met with representatives of Permac and discussed the disclosure of records obtained by the IRS to Permac.⁴

The Trial Court refused to grant the adversary (evidentiary) hearing despite the substantial showing by the Petitioners of the abuse of the court's process and the prohibited purpose for the issuance of the

⁴Petitioners also in the pleadings fully developed the background surrounding this agreement with the IRS. Specifically, Petitioners detailed the fact that Permac employed Harvey Kleinman for 20 years and that he left their employment and established a competitive business enterprise; that Permac sued Petitioners in State Court in Florida for alleged acts occurring when he was their sales manager and after leaving their employment; that a vendetta was being waged by Permac against Petitioners in an effort to destroy both them and their fledgling competitive business enterprise.

summons. Even the government had acquiesced and agreed in its Response to the Motion for Evidentiary Hearing that Petitioners had a right to such evidentiary hearing.⁵

Though the Courts of Appeal have disagreed on whether a taxpayer may merely plead "bad faith" or must support such allegations with affidavits,⁶ all Courts of Appeal, until the case at bar, have agreed that some form of adversary (evidentiary) hearing is required.⁷ Petitioners were denied an adversary (evidentiary) hearing and never had the opportunity to prove the bad faith as alleged.

The present case is also highly distinguishable from the cases where the taxpayer has alleged that the "bad faith" purpose for the issuance and service of the summons was to gather evidence to criminally prosecute the taxpayer. See, e.g., *United States v. LaSalle*, *supra*.

⁵The government relying upon the decision of *United States v. Harris*, 628 F.2d 875 (5th Cir. 1975) agreed that an evidentiary hearing was required. *United States v. Harris*, *supra*, analyzed in depth *Reisman v. Caplin* and *United States v. Powell*, concluding that the right to an adversary (evidentiary) hearing to a taxpayer who alleges an abuse of the court's process or a purpose not authorized by Section 7602 of the Code, must be granted.

⁶Compare, *United States v. Southeast First National Bank of Miami Springs*, *supra*, 655 F.2d 661 (5th Cir. 1981), where the Court determined an allegation of "bad faith" was sufficient with *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36 (2d Cir. 1978) where the Court required affidavits setting forth facts supporting the allegations of bad faith.

⁷See cases cited at page 7, *supra*.

Petitioners do not allege such purpose but that the purpose was to disclose taxpayers' records to a third party and therefore, was not authorized by Sections 7602 and 7609 of the Code. Under similar circumstances where taxpayers alleged, supported by affidavits, that the purpose for the issuance and service of the summonses was to close down the taxpayer's business, who were tax shelter promoters, the Court of Appeals relying upon *Reisman v. Caplin*, and its progeny, held that the adversary (evidentiary) hearing requested by taxpayers should be granted. *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, (9th Cir. 1983). The taxpayers in the present case have similarly alleged that the records to be disclosed to the third party, Permac, are to be used by Permac in its state court litigation and to destroy Petitioners, and their fledgling competitive business enterprise. Congress has very clearly spoken on the question of disclosing taxpayer records to unauthorized persons and clearly prohibited such disclosure.⁵

It would indeed be an anomaly in the law that the Petitioners should have a right to an adversary (evidentiary) hearing to prove the "bad faith" as alleged and yet be denied that right because the summoned records were turned over to the IRS and the Court of Appeals dismiss the case as moot. The right to such a hearing will indeed be meaningless because Petitioners would be left without any remedy to prevent the alleged abuse of the Court's process or to prove the alleged

⁵Section 7213 of the Code, *Unauthorized disclosure of information*, 26 U.S.C. §7213, and Section 6103 of the Code, *Confidentiality and disclosure of returns and return information*, 26 U.S.C. §6103, both prohibit disclosures of taxpayer records to any unauthorized person.

abuse of the Court's process or to prove the alleged violation of Sections 7602 and 7609 of the Code. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

B. Conflict Existing Among The Courts Of Appeal.

As pointed out above, all Courts of Appeal, save the Eleventh Circuit, have consistently held that *Reisman v. Caplin* and its progeny mandate that an adversary hearing must be given to a taxpayer who properly alleges in an IRS summons enforcement proceeding "bad faith", that the summons was issued for a purpose not authorized by Section 7602 or whose enforcement would be an abuse of the court's process. (See, cases cited at page 7, *supra*). Though the Courts of Appeal have not uniformly agreed upon the extent and scope of the *Reisman-Powell-LaSalle* mandated adversary hearing, all have concurred that some form of adversary hearing is required.

The conflict between the decisions of the First, Second, Third, Fifth and Ninth Circuits with the decision of the Court in the case at bar is patent. Petitioners sought an adversary (evidentiary) hearing before the United States District Court for the Southern District of Florida properly pleading "bad faith" supported by affidavits. Such adversary hearing was denied and Petitioners never had an opportunity to present any evidence, examine the investigating agent or any other institutional representative of the IRS. Despite timely Motions to Stay filed with the trial court and the Eleventh Circuit, a stay pending appeal was denied. The eleventh Circuit dismissed the appeal as "moot" upon a Motion to Dismiss for mootness filed by the government, opposed

by Petitioners, after the IRS obtained the summoned records.

Because of the clear conflict existing between the Courts of Appeal granting to taxpayers a *Reisman-Powell-LaSalle* adversary hearing and the case at bar where such adversary hearing was denied, *certiorari* should be granted. To do otherwise would render the right to such adversary hearing illusory and forever preclude Petitioners from having an opportunity to prove the "bad faith" purpose for the service of the summonses.

C. The Denial Of The Right To An Adversary Hearing To Petitioners Is A Denial Of Due Process Of Law As Required By The Fifth Amendment To The United States Constitution

The right of a taxpayer to an adversary hearing in an IRS summons enforcement proceeding recognized by *Reisman v. Caplin* and consistently adhered to by this Court is a recognition of the basic right of an opportunity to be heard. The right to be heard is a fundamental requirement of due process of law. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Goldberg v. Kelley*, 397 U.S. 254, 268 (1970). Any such hearing in order to comport with due process must be "at a meaningful time and in a meaningful manner". *Armstrong v. Monzo*, 380 U.S. 545, 552 (1965). This right, in the context of an adversary hearing where questions of fact are to be determined by the trier of fact, must also include an opportunity to confront and cross-examine witnesses. *Wilner v. Committee on Character & Fitness*, 373 U.S.

96, 103-104 (1963); *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

Congress, in furtherance of the *Reisman-Powell-LaSalle* trilogy reserved to Taxpayers an adversary hearing, by enacting Section 7609 of the Code which grants to taxpayers the right to intervene in summons enforcement proceedings and step into the shoes of a third-party recordkeeper. Disturbed by the Court's decision in *United States v. Donaldson*, 400 U.S. 517 (1971) wherein the Court held that the right to intervene required that the taxpayer have a proprietary interest in the books and records summoned, Congress eliminated such requirement granting automatic intervention.⁹ Congress therefore engrafted automatic standing upon an already existing right to an adversary hearing mandated by this Court in *Reisman*, *Powell* and *LaSalle*.

In *United States v. Southeast First National Bank of Miami Springs*, 655 F.2d 661, 665 (5th Cir. 1981) the Court discussed at length the right to the *Reisman-Powell-LaSalle* mandated adversary hearing. The Court refused to accede to the government's challenge to that right where a taxpayer had only generally alleged "bad faith". The Court recognized that it would be impossible for a taxpayer to allege precise facts or support such allegations with an affidavit because in most cases a taxpayer could only obtain those facts through an adversary hearing. The taxpayer would not be saddled with a "Catch 22" requirement of having to

⁹See, 4 U.S. Code Cong. & Admin. News, 3302-3308, 3205, wherein the Joint Committee specifically stated Section 7609 was designed to permit taxpayers as intervenors to stand in the shoes of third party record keepers and assert any defense available to them.

plead facts where the only forum the taxpayer had to obtain those facts was an adversary hearing before the Court. Stated differently, the Court simply recognized that fundamental fairness and due process of law required that a taxpayer be granted an adversary hearing.

The words "adversary hearing" mandated by *Reisman*, *Powell* and *LaSalle* at a minimum means at least an opportunity to examine the agent who issued the summonses and determine his motives.¹⁰ It is obvious to any lawyer who has ever tried a case that due process requires more than trial by affidavits once any dispute of material fact is in issue or such allegations and affidavits infer a possibility that "bad faith" is an issue. The *Reisman-Powell-LaSalle* mandated adversary hearing requires at a minimum that a taxpayer be given the opportunity to examine the investigating agent of the IRS and present evidence and witnesses in support of the taxpayer's position.

LaSalle made clear that in order to enforce an IRS summons, several requirements must be met. First, the summons must be issued before the IRS recommends criminal prosecution to the Department of Justice. Second,

"the Service at all times material must use the summons authority in good faith pursuit of the congressionally authorized purposes of

¹⁰*United States v. LaSalle*, 437 U.S. 313, 316-18 (1978). See, notes 17, 18 and 19, wherein the Court acknowledged examination of the investigating agent may be necessary and further opined that *Powell* was not an exclusive pronouncement on the "bad faith" purposes for which a Court would grant relief in an IRS Summons Enforcement proceeding.

§7602. This second requirement requires the Service to meet the *Powell* standards of good faith". 437 U.S. at 317.

Where taxpayers such as Petitioners place that question of "good faith" in issue with appropriate responses supported by affidavits, an adversary hearing and opportunity to be heard is a basic requirement of due process of law.

The federal district court and the Eleventh Circuit erred in refusing to grant Petitioners an evidentiary hearing. It would be a pernicious precedent to permit any court to deny to Petitioners an adversary hearing to which they are entitled and permit a case such as this to be dismissed as "moot". Due process of law requires that the *Reisman-Powell-LaSalle* mandated adversary hearing be granted to the Petitioners.

- D. This Case Is Not Rendered Moot Because The IRS Obtained The Records Summoned Where There Is A Reasonable Expectation That The Wrong Will Be Repeated, The Acts Alleged By Petitioners Are Capable Of Repetition Yet Will Evade Review And An Abuse Of The Court's Process Is Not Rendered Moot Because The Summoned Records Are Obtained.**

Petitioners were entitled to a *Reisman-Powell-LaSalle* mandated adversary hearing. Upon not being granted such adversary hearing Petitioners sought a stay first from the federal district court and then from the Eleventh Circuit. Both Motions for Stay pending appeal were denied.

There is currently pending in the United States Court of Appeals for the Second Circuit a case concerning the same parties arising out of an IRS summons enforcement proceeding in the United States District Court for the Eastern District of New York.¹¹ Petitioners (Appellants) in that case have alleged the same facts as were alleged in the case at bar; to wit, that the summonses were issued for a "bad faith" purpose not authorized by Sections 7602 and 7609 of the Code and the enforcement of same would be an abuse of the Court's process. The district court in that case denied to Petitioners the right to an adversary hearing, but the Court of Appeals for the Second Circuit stayed enforcement pursuant to a stipulation of the parties.¹²

This Court has held that where a case concerns acts which are "capable of repetition, yet evading review" the case will not be rendered moot because the act sought to be reviewed has been consummated. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) the Court announced general principles for application of the doctrine and stated:

"[I]n the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements

¹¹*Harvey and Bonnie Kleinman v. United States of America*, Case No. 83-6265.

¹²In that case, 83-6265, pending before the Second Circuit, enforcement of some thirteen summonses served upon banks, savings and loans and one stock brokerage firm are stayed.

combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Because a stay was denied by both the federal district court and the Eleventh Circuit and no adversary hearing granted, the action challenged (enforcement of the summonses) was never litigated. Moreover, because there is now pending in the Second Circuit an appeal which has for the present been stayed and in which the Petitioners as the complaining party have alleged the identical "bad faith" motive for the issuance of the IRS summonses, there is a reasonable expectation that Petitioner would be subjected to the same action again, to wit, enforcement of the summonses without an adversary hearing.¹³

There are also "collateral consequences" in the case at bar to the Petitioners so that they have a personal stake in the outcome of the case. If Petitioners' contentions are true, that a private third party will obtain taxpayer's records, the injury to Petitioners extends beyond the IRS obtaining such records. The disclosure of such records to a private third party is a

¹³Oral argument under an expedited appeal procedure is now scheduled before the Second Circuit on October 14, 1983.

real and immediate injury so that Petitioners have a personal stake in the outcome of the case.¹⁴

Finally, *Reisman*, *Powell* and *LaSalle* made it abundantly clear that the enforcement of an IRS summons for a purpose not authorized by Section 7602 of the Code or where said summons was served in "bad faith" would be an abuse of the court's process. Even though the IRS has obtained records summoned, this would not ameliorate nor render moot such an abuse of the court's process. If, as alleged and supported by affidavits, the IRS has entered into an unholy alliance with Permac agreeing to disclose those records to Permac, the use of a federal district court and United States Court of Appeals for such purpose would clearly abuse the process of both Courts. Federal courts have a broad and inherent power "over their own process, to prevent abuses, oppression and injustice". *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888); *Ownbey v. Morgan*, 256 U.S. 94, 110 (1921); *See, also, Roadway Express, v. Piper*, 100 S.Ct. 2455 (1980).

The case at bar is clearly not one in which the "no harm, no foul" cliché may be applied. The harm both to the court and the Petitioners is real, immediate and of a continuing nature. An abuse of the court's process as alleged by Petitioners is not rendered moot merely because the IRS obtained the summoned records.

¹⁴*See, e.g., Sibron v. New York*, 392 U.S. 40, 50-58 (1968) and *North Carolina v. Rice*, 404 U.S. 244 (1971) where a criminal conviction was not rendered moot because a prison term had been served where the conviction affected the person's ability to vote, hold public office or be a juror. Similarly, enforcement of the summonses means to Petitioners that records in which they have a proprietary interest will be disclosed to a private third party without their consent or approval.

CONCLUSION

The right to an adversary hearing in an IRS summons enforcement proceeding, where a taxpayer properly alleges "bad faith" is mandated by this Court's decisions in *Reisman, Powell and LaSalle*. The right to such hearing is simply the right to be heard, a fundamental requirement of due process of law.

Therefore, the Petition for Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit should be granted.

Respectfully submitted,

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Appendix

[FILED AUG 17 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5357

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent, IRS,
Plaintiffs-Appellees,

versus

BANK OF CORAL SPRINGS,
Defendant,

HARVEY S. KLEINMAN and
BONNIE M. KLEINMAN,
Intervenors-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before HILL, KRAVITCH and CLARK, Circuit
Judges.

BY THE COURT:

The Motion of appellee(s) to dismiss the appeal as
moot is granted.

[FILED 1983 APR 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL NO. 83-6020-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,
Petitioners,

v.

BANK OF CORAL SPRINGS,
Respondent.

CIVIL NO. 83-6021-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,

v.

BANK OF CORAL SPRINGS,
Respondent.

CIVIL NO. 83-6022-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE

v.

BROWARD FEDERAL SAVINGS AND LOAN,
Respondent.

CIVIL NO. 83-6023-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent,
INTERNAL REVENUE SERVICE,

v.

BROWARD FEDERAL SAVINGS AND LOAN,
Respondent.

In the Matter of the
Tax Liability of
HARVEY S. KLEINMAN.

ENFORCEMENT ORDER AND JUDGMENT

This consolidated matter having come on for hearing before the undersigned on April 22, 1983, pursuant to the Court's Order to show cause, the parties having appeared and been heard, the Court having reviewed the submissions of the parties and being fully aware in the premises and it appearing that each of the summonses issued by the petitioner, Special Agent Eugene Brozen,

to the respondent, Bank of Coral Springs, on January 8, 1982 and April 12, 1982, and to the respondent, Broward Federal Savings and Loan, on January 8, 1982 and April 12, 1982, (1) was issued for a legitimate purpose, that is, the investigation of the correct federal income tax liabilities and returns of Harvey S. Kleinman for the years 1977, 1978, 1979 and 1980, (2) that the summoned testimony and date may be relevant to that determination, (3) that the books, records, papers and other data sought are not already in the possession of the Internal Revenue Service, and (4) that the administrative steps required by the Internal Revenue Code have been followed, it is therefore

ORDERED, ADJUDGED AND DECREED that the intervening taxpayer's Motions to Dismiss or for Judgment on the Pleadings, to Strike, for Evidentiary Hearing and to Take Oral Examination at Trial of Special Agent Brozen, and to Strike Petition to Enforce Summons or, in the alternative, to Quash Summons are each denied, and it is further

ORDERED, ADJUDGED and DECREED that the respondent, Bank of Coral Springs, appear before Special Agent Eugene Brozen, or any other proper official of the Internal Revenue Service at a time, date and place as shall be specified by Special Agent Brozen or other proper official of the Internal Revenue Service, then and there to be sworn, to give testimony, and to produce for examination and copying the books, records, papers and other data demanded by the summonses served upon it on January 8, 1982 and April 12, 1982, the examination to continue from day to day until completed, and it is further

ORDER, ADJUDGED and DECREED that the respondent, Broward Federal Savings and Loan, appear before Special Agent Eugen Broze, or any other proper official of the Internal Revenue Service at a time, date and place as shall be specified by Special Agent Brozen or other proper official of the Internal Revenue Service, then and there to be sworn, to give testimony, and to produce for examination and copying the books, records, papers and other data demanded by the summonses served upon it on January 8, 1982 and April 12, 1982, the examination to continue from day to day until completed.

DATED this 23 day of April, 1983, at Fort Lauderdale, Florida.

Norman C. Roettger
UNITED STATES DISTRICT JUDGE

cc: United States Attorney
Attn: Lloyd G. Bates
Assistant U.S. Attorney

Alvarez L. LeCesne, Jr.
Trial Attorney, Dept. of Justice

Robert A. Shupack
Counsel for Harvey S. Kleinman

Bank of Coral Gables

Broward Federal Savings and Loan

AMENDMENT V,
CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

TITLE 26, UNITED STATES CODE

§7602. Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to

perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

TITLE 26. UNITED STATES CODE

§7609. Special procedures for third-party summonses.

(a) Notice.

(1) In general, If—

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and (B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which

has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) Sufficiency of notice. Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined. For purposes of this subsection the term "third-party recordkeeper" means —

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A);

(B) any consumer reporting agency (as defined under section 602(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f);

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78C(a)(4))

(E) any attorney; and

(F) any accountant.

(4) Exceptions. Paragraph (1) shall not apply to any summons—

(A) served on the person with respect to whose liability the summons is issued, or any officer or employer of such person.

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons. Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to stay compliance.

(1) Intervention. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(c) Summons to which section applies.

(1) In general. Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)

(2), 6424 (d)(2) or 6427(f)(2) [6427(g)(2)] and requires the production of records.

(2) Exceptions. A summons shall not be treated as described in this subsection if—

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A, or

(B) it is in aid of the collection of —

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony. For purposes of this section —

(A) the term “records” includes books, papers or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) Restriction on examination of records. No examination of any records required to be produced under a summons as to which notice is required under subsection(a) may be made —

(1) before the expiration of the 14 day period allowed for the notice not to comply under subsection (b)(2), or

(2) when the requirements of subsection (b)(2) have been met, except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance.

(e) Suspension of statute of limitations. If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person) then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(f) Additional requirement in the case of a John Doe summons. Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served, only after a court proceeding in which the Secretary establishes that —

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. In the case of any summons described in subsection (c), the provision of subsections (a) (1) and (b) shall not apply if, upon petition by the Secretary, the Court determines, on the basis of facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion or to flee to avoid prosecution, testifying or production of records.

(h) Jurisdiction of district court.

(1) The United States District Court for the district within which person to be summoned resides or is found shall have jurisdiction to hear and determine proceedings brought under subsections (f) or

(g) The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely upon the petition and supporting affidavits. An order denying the petition shall be deemed a final order which may be appealed.

(2) Except as to cases the court considers of greater importance a proceeding brought for the enforcement of any summons, or a proceeding under this section,

and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

[FILED 1983 APR 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL NO. 83-6020-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,
Petitioners,

v.

BANK OF CORAL SPRINGS,
Respondent.

CIVIL NO. 83-6021-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,

v.

BANK OF CORAL SPRINGS,
Respondent.

CIVIL NO. 83-6022-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,

v.

BROWARD FEDERAL SAVINGS AND LOAN,
Respondent.

CIVIL NO. 83-6023-CIV-NCR

UNITED STATES OF AMERICA and
EUGENE BROZEN, Special Agent
INTERNAL REVENUE SERVICE,

v.

BROWARD FEDERAL SAVINGS AND LOAN,
Respondent.

In the Matter of the
Tax Liability of
HARVEY S. KLEINMAN.

**ORDER DENYING MOTION FOR STAY
PENDING APPEAL**

Counsel for intervening taxpayers, at the hearing before the undersigned on April 22, 1983, having orally moved this Court for a stay of the order entered by this Court enforcing each of the summonses issued in the above consolidated matter, the parties having been heard, the Court being fully aware in the premises, and it appearing that there is no grounds justifying the motion for stay pending appeal, it is therefore

ORDERED, ADJUDGED and DECREED that the motion be and is denied.

DATED this 23 day of April, 1983, at Fort Lauderdale, Florida.

[Illegible]

United States District Judge

cc: United States Attorney
Attn: Lloyd G. Bates
Assistant U.S. Attorney

Alvarez L. LeCesne, Jr.
Trial Attorney, Dept. of Justice

Robert A. Shupach
Counsel for Harvey S. Kleinman

Bank of Coral Gables

Broward Federal Savings and Loan

[FILED APR 25 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

83-6021-Civ-NCR
83-6020-Civ-NCR
83-6022-Civ-NCR
83-5279 Civ-NCR
83-6023-Civ-NCR

UNITED STATES OF AMERICA,
Petitioner-Appellee,

versus

BANK OF CORAL SPRINGS and
BROWARD FEDERAL SAVINGS & LOAN,
Respondents,

HARVEY S. KLEINMAN and
BONNIE M. KLEINMAN,
Intervenors-Appellants.

**Appeal from the United States District Court for the
Southern District of Florida**

Before TJOFLAT, JOHNSON and HATCHETT, Circuit
Judges.

BY THE COURT:

The Motion of appellant(s) for stay pending appeal
is DENIED.